WICK, DAMAGES, 9 ed., § 94. See *Virginia Hot Springs Co.* v. *McCray,* 106 Va. 461, 56 S. E. 216, 10 L. R. A. (N. S.) 465; *Worley* v. *Mathieson Alkali Works* (Va.), 89 S. E. 880. Other courts, looking more to the nature of the injury than to the character of the structure, declare that the law will not presume that one will continue to injure the land of another, and that hence the continuing injury is made up of a succession of trespasses by the defendant. *Schlitz Brewing Co.* v. *Compton,* 142 Ill. 511, 32 N. E. 693, 18 L. R. A. 390. Obviously, under this rule only damages suffered up to the time of the commencement of the suit can be assessed; but the plaintiff has a right of action as long as the injury continues. *Aldworth* v. *City of Lynn,* 153 Mass. 53, 26 N. E. 229, 25 Am. St. Rep. 608, 10 L. R. A. 210; *Schlitz Brewing Co.* v. *Compton, supra.* An exception to this rule, which seems sound on principle, exists where the building of the permanent structure is authorized by law—such as the building of a railroad—and here it is proper to recover all damages, past and future, in one action. *Fowle* v. *New Haven & N. Co.,* 107 Mass. 352; *Chicago, etc., R. Co.* v. *Loeb,* 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341. Still another class of cases, to which the principle case seems to belong, look both to the character of the structure and to the nature of the injury, and allow compensation once for all whenever the structure is permanent and its construction and continuance constitute a complete original injury. *Bizer* v. *Ottumwa Hydraulic Power Co.,* 70 Iowa 145, 30 N. W. 172. See *Troy* v. *Cheshire Railroad Co.,* 23 N. H. 83, 55 Am. Dec. 177. If, however, the structure is not permanent, or the nature of the injury is not permanent and complete, there should be a recovery for damages only to the time of the commencement of the action. *Harvey* v. *Mason City, etc., Ry. Co.,* 129 Iowa 465, 105 N. W. 958, 113 Am. St. Rep. 483, 3 L. R. A. (N. S.) 973; *St. Louis, etc., R. Co.* v. *Biggs,* 52 Ark. 240, 12 S. W. 331, 6 L. R. A. 804.

The last class of cases must not be confused with those cases in which the tortfeasor goes on the land of the plaintiff and there erects a structure. In this situation, by the better view, the plaintiff must recover all damages, both past and future, in one action; for, in order to remove the structure, the defendant would be compelled to commit another trespass, and "the law will not be so foolish as to presume that one will commit a trespass." *Kansas Pacific Ry. Co.* v. *Mihlman,* 17 Kan. 224.

EMINENT DOMAIN—RIGHTS OF LANDOWNER—RECOVERY OF LAND NOT IN PUBLIC USE.—The defendant railroad company was in actual possession of land claimed by the plaintiffs. After a period of fifty years, during which time the plaintiffs neither occupied any of the land nor contested the title thereto, they brought a suit in equity to quiet title to the land, alleging that a portion of it was not needed for railroad use. *Held,* the action will not lie. *Ennis-Brown Co.* v. *Central Pac. Ry. Co.,* 235 Fed. 825.

EQUITY—JURISDICTION—FAILURE TO PLEAD ADEQUATE REMEDY AT LAW.—The plaintiff filed a bill in equity to enjoin an action against him by the defendant in the courts of Vermont. The defendant answered gen-

erally, and then attempted to set up the defense that the plaintiff had an adequate remedy at law in the courts of Vermont. *Held,* the defendant, by answering generally, submitted to the equity jurisdiction, and waived the defense. *Edgett* v. *Palmer* (Mass.), 114 N. E. 683.

It is settled, both in this country and in England, that neither waiver nor consent can confer jurisdiction upon courts of equity over matter which is within the exclusive jurisdiction of courts of law. *Lewis* v. *Cocks,* 23 Wall. 466; *Freer* v. *Davis,* 52 W. Va. 1, 43 S. E. 164, 94 Am. St. Rep. 895, 59 L. R. A. 556; *Foley* v. *Hill,* 2 H. L. C. 28. Hence, though no objection is made by the defendant, the court will, *sua sponte,* at any stage of the proceedings, take notice of the total absence of equity jurisdiction. *Lewis* v. *Cocks, supra.* See *Ohio River R. Co.* v. *Gibbens,* 35 W. Va. 57, 12 S. E. 1093. And equity will never allow a fraud to be committed upon its jurisdiction by mere colorable pretenses of equitable grounds, but in such a case will refuse to take cognizance of bill. *Jones* v. *Bradshaw,* 16 Gratt. (Va.) 355.

Generally, if the plaintiff has an adequate remedy at law, this is a good defense to a suit in equity; and if the defendant demur to the bill, it will be thrown out, and the plaintiff will be remitted to his legal remedy. *Colton* v. *Ross,* 2 Paige Ch. (N. Y.) 396, 22 Am. Dec. 648. But in a case where equity is competent to administer relief and the subject matter is within the general field of equity jurisdiction, unless the defendant sets up this defense at the proper time, he thereby waives it. *Niles* v. *Williams,* 24 Conn. 279; *Tarbell* v. *Bowman,* 103 Mass. 341. So, where the defendant answered generally to the merits he could not thereafter set up this defense. *Creely* v. *Bay State Brick Co.,* 103 Mass. 514; *Tenney* v. *State Bank,* 20 Wis. 152; *Tarbell* v. *Bowman, supra.* In such a case the parties may also validly stipulate that they will not question the jurisdiction of the court of equity. *Bank of Utica* v. *Utica,* 4 Paige Ch. 399, 27 Am. Dec. 72.

Though the authorities agree on the general principles, they are applied very differently by different courts. Clearly, in such cases as slander, assault and battery, and other actions for torts sounding purely in damages, or cases involving the legal title to land, or debt on a written instrument, the relief is of a purely legal character and equity cannot take jurisdiction, even though the parties consent. See *Tenney* v. *State Bank, supra; Green* v. *Creighton,* 10 Smedes & M. (Miss.) 159, 48 Am. Dec. 742; *Lewis* v. *Cocks, supra; Freer* v. *Davis, supra.* Likewise, in cases clearly within the equity jurisdiction, equity will retain the bill, though there is an adequate remedy at law. *First Congregational Society* v. *Trustees,* 23 Pick. (Mass.) 148. Where, however, the plaintiff seeks special relief from a court of equity, instead of relying on his legal remedy, and the defendant fails to demur to the bill, the courts are in conflict as to whether equity should retain jurisdiction of the case. *Massachusetts General Hospital* v. *Assurance Co.,* 4 Gray (Mass.) 227; *Foley* v. *Hill, supra.* Thus, where an injunction is sought but no ground for it exists, some cases hold that the court should, and some that it should not, go on with the case. *Collins* v. *Jones,* 6 Leigh (Va.) 530, 99 Am. Dec. 216; *Ohio River R. Co.* v. *Gibbens, supra; Creely* v. *Bay State Brick Co., supra.* On principle, those

cases seem sound which hold that where equity has jurisdiction over the general subject-matter and is competent to administer relief, a failure to set up the defense of an adequate remedy at law is a waiver of it; for the "lack of jurisdiction" which can be waived in these cases is a far different thing from a "lack of jurisdiction" on account of being unable to take cognizance of the cause at all.

EVIDENCE—ADMISSIBILITY—EXHIBITION OF INFANT IN BASTARDY PROCEEDINGS.—The court permitted the plaintiff to introduce an illegitimate child three months old as evidence in bastardy proceedings, for the purpose of having the jury compare it with the defendant, the putative father, to detect resemblances between them. *Held,* the introduction of the child as evidence constituted reversible error. *Flores* v. *State* (Fla.), 73 South. 234. See NOTES, p. 490.

INSURANCE—HEALTH INSURANCE—FALSE REPRESENTATION OF SOUND HEALTH.—In an application for health insurance, the plaintiff innocently represented that he was in a sound condition physically, when in fact he had hernia, though to a very slight extent. It was provided by statute that no misrepresentation should bar recovery on a policy, unless fraudulent or material. *Held,* the plaintiff's misstatement will not vitiate the policy. *Hines* v. *New England Casualty Co.* (N. C.), 90 S. E. 131.

A warranty that the insured is in good or sound health is not broken, except by an ailment which is serious enough to affect and undermine his physcal constitution. See *Blackman* v. *United States Casualty Co.,* 117 Tenn. 578, 103 S. W. 784; *McDermott* v. *Modern Woodmen of America,* 97 Mo. App. 636, 71 S. W. 833. Only an ordinary degree of good health is required, and the question is usually one of fact for the jury. *French* v. *Fidelity & Casualty Co.,* 135 Wis. 259, 115 N. W. 869, 17 L. R. A. (N. S.) 1011; *Mays* v. *New Amsterdam Casualty Co.;* 40 App. D. C. 249, 46 L. R. A. (N. S.) 1108. See *Rathman* v. *New Amsterdam Casualty Co.,* 186 Mich. 115, 152 N. W. 983, L. R. A. (N. S.) 1915E, 980. But where the insured was in advanced stages of consumption, the question was not submitted to a jury. *Maine Benefit Ass'n* v. *Parks,* 81 Me. 79, 16 Atl. 339, 10 Am. St. Rep. 240. Pregnancy, in the case of a female applicant, being a normal function of a healthy body, is not a breach of such a warranty. *Merriman* v. *Grand Lodge Degree of Honor,* 77 Neb. 544, 110 N. W. 302, 8 L. R. A. (N. S.) 983. See *Rasicot* v. *Royal Neighbors of America,* 18 Idaho 85, 108 Pac. 1048, 29 L. R. A. (N. S.) 433. Nor, ordinarily, does asthma constitute a breach. *Blackman* v. *U. S. Casualty Co., supra.* Nor a cold, even though it later turns into pneumonia and causes the death of the insured. *Barnes* v. *Fidelity Mutual Life Ass'n,* 191 Pa. St. 618, 43 Atl. 341, 45 L. R. A. 264. See *Manhattan Life Ins. Co.* v. *Carder,* 82 Fed. 986.

When the applicant warrants that all statements by him are literally true, any misstatements as to health, however innocent, avoid the policy. *Cobb* v. *Covenant Mutual Benefit Ass'n,* 153 Mass. 176, 26 N. E. 230, 10 L. R. A. 666, 25 Am. St. Rep. 619; *Rathman* v. *New Amster-*